

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

**RESPONDENT’S MOTION TO DISMISS
Agency No. A008-237-417**

Introduction

Pursuant to Fed. R. App. P. 27 and 6 Cir. R. 27(d), Respondent hereby moves to dismiss the pending Petition for Review and related Motion for a Stay (“Pet. Rev.”) because the matter sought to be reviewed is now moot. On April 14, 2009, Petitioner asked this Court to review “an Order of the Board of Immigration Appeals denying petitioner’s Emergency Stay of Removal.” (Pet. Rev. at 1.) As the Board of Immigration Appeals (“BIA”) noted in its order, Petitioner had sought a stay “*pending* consideration of the Board of [his] motion to reopen.” (emphasis added).

Indeed, the linchpin of Petitioner's argument concerning the jurisdiction of this Court was that his removal was "imminent" and that he could be removed *before* the BIA ruled on his motion to reopen. (Motion for Stay Pending Review at 4.) On April 15, 2009, the BIA denied that motion in a written decision, making the relief Petitioner requests no longer available. Accordingly, this Court should dismiss the petition as moot.*

The Current Case Is Moot and Should Be Dismissed

As this Court has noted, the Constitution's "case or controversy requirement confines the jurisdiction of the courts to real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character[.]" *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009) (citation and internal quotation marks omitted); *see also* U.S. Const. art. III, § 2. A court lacks jurisdiction to rule on a case or issue that has "lost its character as a present, live controversy." *Hall v. Beals*, 396 U.S. 45, 48 (1969).

Here, the relief Petitioner seeks is no longer available, *i.e.*, review of the BIA's denial of his request for a stay of removal pending resolution of his motion to reopen.

* Petitioner can appeal to this Court the BIA's denial of his motion to reopen and can also seek a stay from this Court as part of that appeal. However, the current proceeding is not the proper vehicle for that appeal or stay petition.

Since the BIA has denied his motion to reopen, there is no present, live controversy on which this Court can rule.

This Court's decision in *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007), is controlling. There, the plaintiffs had sought to prevent placement of an affirmative action initiative on the 2006 Michigan general election ballot. *Id.* at 587-590. The district court's factual findings, which were accepted by this Court, indicated that the general election ballot was "rife with fraud and deception" and that the proposed amendment "found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes." *Id.* at 591. Despite "the disturbing allegations" underlying the plaintiffs' complaint, the lawsuit was dismissed" because the initiative had been approved by the voters. *Id.* at 586, 592.

This Court reasoned that the opportunity to keep the initiative off the ballot had long since passed, precluding it from providing the requested relief:

[B]ecause it is too late for us to grant the relief that the Plaintiffs requested in their complaint and litigated in the district court, any opinion that we issue addressing the merits of their Voting Rights Act challenge would be advisory.

Id. at 592. Thus, the appeal was dismissed as moot. *Id.*

As in *Operation King's Dream*, it is too late for this Court to grant the relief Petitioner requests. He sought to stay removal *pending* the outcome of his motion to reopen. That motion is no longer pending before the BIA; the BIA has rendered its decision.

By seeking dismissal of this case, Respondent is not trying to avoid the Court's concerns that were implicit in its briefing Order, dated April 16, 2009, or to remove Petitioner before he has an opportunity to appeal the BIA's April 15, 2009 decision. In fact, Respondent stands by the assurance it made in the Fed. R. App. P. 28(j) letter it filed on April 17, 2009, agreeing that it will "not remove Petitioner for five days following this Court's dismissal order up to and including April 30, 2009, affording Petitioner ample time to appeal the BIA's ruling and litigate a stay motion."

The Respondent is concerned, however, that if the Court does not dismiss this petition for review, the wrong issues will be argued. This would waste judicial resources and result in even more delay—again frustrating Respondent's legitimate efforts to carry out the immigration court's final order of removal. Petitioner has engaged in numerous delaying tactics, and allowing this mooted matter to continue would only afford him further opportunities for delay. For example, a judge in Germany issued an arrest order on March 10, 2009 (made public the next day), yet Petitioner did not move the BIA to reopen his case until April 2, 2009. The

Immigration Judge who first granted petitioner a stay lifted it effective April 8, 2009, when he realized he lacked jurisdiction, yet Petitioner waited until hours before his scheduled removal before commencing the mad scramble to obtain a stay from this Court on April 14, 2009. Petitioner now has a legitimate avenue for appeal, and the instant matter should be terminated.

Conclusion

For the above stated reasons, Respondent respectfully requests that this matter be dismissed as moot.

Respectfully submitted,

s/Robert Thomson
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2009, the foregoing Respondent's Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system

/s/ Robert Thomson

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